IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEALNO.150 OF 2005

Dr.Padmakar Vishnu Vartak .. Appellant

Versus

Smt. Leelabai Vasant Vartak & ors. Respondents

Mr.A.P.Lavate for appellant

Mr.Narendra Walawalkar with G.H.Keluskar for respondents

CORAM : P.V.KAKADE, J.

DATE : 4TH OCTOBER, 2005.

P.C.:

1. This is an appeal preferred by the appellant against the judgment and order passed by Addl.District Judge, Pune dated 29.10.2004 dismissing the appeal and confirming the judgment and order passed by Civil Judge, Junior Division, PMC, Pune dated 19.7.1999 holding that (i) in view of the final judgment of High Court in Regular Second Appeal No.44 of 1985 the right of

easement is already declared and (ii) the plaintiffs' prayer of restraining defendant no.1 from construction and restraining defendant no.2 from giving permission became infructuous and (iii) it was hereby directed to defendant to remove and have sloping slab in front of the window of plaintiff in such a way that the right of air, light and privacy will be kept intact.

2. I have heard the learned counsel for both the parties. Perused the record including the compilation which was provided for my perusal of the entire documents on record.

3. At this juncture it may be noted that the trial court has passed decree in respect of light, air and privacy. However, it is an admitted position that the right of privacy is not subject matter of the present dispute, as it has been decided by the High Court in the earlier round of the proceedings between the parties and it has attained finality.

4. The plaintiffs-respondents came with the case that he was the owner of the house bearing CTS No.520 located at Shaniwar Peth, Pune. The appellant is owner

of CTS No.521, which is on the eastern side of the plaintiffs' house CTS No.520. Both the parties are closely related. Deceased Vasant who was the husband of plaintiff no.1 and father of plaintiff Nos.4 and 5, was also real brother of plaintiff nos.2 and 3 and defendant Dr.Padmakar. In the year 1936, late Vishnu, who was the father of plaintiff no.2 and defendant Padmakar and late Vasant purchased City Survey No.520 and construction was made thereon. In the year 1948, late Vishnu purchased City Survey No.521. It was an open plot with some small structure. By sale deed dated 1.4.1966 the plaintiff nos.2 and 3 and their deceased brother Vasant, conveyed City Survey No.521 in favour of their brother, defendant no.1 Padmakar. The plaintiffs' building from City survey No.520 is having several windows on its eastern side to receive air and light from the side of defendant's house. Thus, according to the plaintiffs, City Survey No.520 is the dominant tenement. It was averred by the plaintiffs that in the year 1966 at the time of partition of family property between their brothers, right of easement was created in favour of the dominant tenement i.e. Survey No.520 over the servient tenement City Survey No.521. It was further alleged that in view of the right of easement the

defendant/appellant, who was the owner of servient tenement was not entitled to erect any construction whatsoever in nature in the servient tenement causing obstruction in their easementary right. However, in the year 1970 the defendant caused obstruction in the plaintiffs' right of enjoyment to receive air and light through the eastern windows of their dominant tenement and therefore, filed Regular Civil Suit No.93 of 1970 claiming declaration and decree for perpetual injunction against the defendant. the said suit was decreed in favour of the plaintiffs and was finally confirmed by the High Court.

. Inspite of this fact, in the month of January 1993 defendant Vasant undertook construction in the rear portion of his house property. He constructed a flat roof slab on the second floor of the building in the southern portion of City Survey No.521 which was about 2" above the sill of the window of the dominant tenement causing obstruction in the plaintiffs' right of easement. It would also cause nuisance by accumulation of the water on the slab. Therefore, by letter dated 27.1.1993 the plaintiffs informed the Asstt. Engineer of defendant no.2 Pune Municipal Corporation and

requested to take all precaution to protect their right of easement but, no cognisance was taken. On the other hand, the plaintiffs learnt that the defendant no.2 permitted the defendant no.1 to undertake construction in the servient tenement City Survey No.521 and therefore, the plaintiffs were constrained to file the suit for declaration and consequential reliefs in the nature of perpetual injunction.

. The defendant resisted the claim, inter alia, denying the allegations made by the plaintiffs that the defendant denied that CTS No.520 was dominent tenement and his property CTS No.521 was servient tenement. It was also averred that plaintiffs claim was baseless and he had not infringed any right whatsoever of the plaintiffs. According to him, there was no right of easement vested in the plaintiffs and as such the suit was sought to be dismissed.

5. The learned trial judge adjudicated the dispute on merits after recording evidence of both the parties and came to the conclusion that the plaintiffs had failed to prove that CTS No.520 had easementary right over CTS No.521 and therefore, the plaintiffs were

entitled for declaration about his stated easementary right. It was further held that the defendant had failed to provide duct in front of window and finally held that the plaintiffs' suit was tenable inspite of that there was no notice under Section 487 of the Bombay Provincial Municipal Corporation Act, 1949. It was also held that the plaintiffs had proved that the defendant's construction had affected their right of light and air through window and as such the suit came to be decreed in the above stated manner.

. The appeal was carried to the District Court. The learned Addl. District Judge after hearing both the parties and on the basis of available evidence held that the plaintiffs-respondents had proved that they had right of easement to receive air and light through the window on the eastern rear side i.e. southern portion of their house City Survey No.520. It was further held that the plaintiffs had proved the easementary right to receive air and light through the disputed window as it was substantially affected. However, it was held that the plaintiffs had proved that they are entitled to mandatory injunction as prayed for and as such the plaintiffs claim was accepted and appeal was dismissed

with costs. Hence the present appeal.

6. At the outset, it may be noted that there is no substantial question of law involved in this appeal. The learned counsel for the appellant brought to my notice the so called substantial questions of law sought to be raised in this appeal to the effect that the lower appellate court did not consider the point whether there is or there would be any substantial loss of air and light through the window, which is totally open, having no construction in front of it, though the matter was remanded specifically to consider the issues on merits. It was further submitted that the lower courts failed to take into consideration the provision of Section 33 of the Easement Act, which stipulates that the owner of the dominant heritage has to prove the disturbance of the easement of any right accessory thereto, which has actually caused substantial damage to the plaintiff or materially diminished, the value of the dominant heritage.

7. After hearing both sides and perusing the entire evidence as well as the judgments of both the courts below I am inclined to hold that these so called

questions of law are seen to have not only been dealt with in proper manner but are also seen to have been adjudicated in legal and proper manner. Much ado was sought to be made on behalf of the appellant regarding observations made by the lower appellate court, which gives impression that there was no actual disturbance of the right regarding air and light of the plaintiffs but there was "possibility" of infringement of such right. On this basis, it was sought to be submitted that Section 33 of the Easement Act contemplates actual damage or affection of right of the party and it is not contemplated future possibility of infringement of said rights. In this regard it must be noted that it is an admitted as well as evident position that there was earlier litigation between the parties and details in that regard are made available for our perusal. The learned counsel for the respondents brought to my notice a copy of the order passed by Civil Judge, Junior Division, PMC Pune passed below Exh.5 in R.C.S No.1044 of 1993. This was an application for temporary injunction filed by the present plaintiffs, in that suit who was also plaintiff, for establishment of his consequential rights. Perusal of the said order makes it clear that the present appelant-defendant had filed

on record a plan for proposed construction for perusal of the court and on the basis of that plan the trial court had observed that slab of the proposed building of second floor was showing inclined position and was not reaching to the window of the plaintiff. It is also clear from the order that the trial court in that suit made site inspection and made such observation to the effect that proposed plan having slope to the impugned construction. On that basis the injunction application came to be disposed of and rejected.

. Thereafter it appears that new plan was sent for sanction and new plan was obtained and sanctioned and construction was made, however, the present defendant, in his defence in the present suit has given his evidence at Exh.97 in para 14 thereof, he has admitted in clear terms that the present construction was not consistent with both sanctioned plans i.e. Exh.53 and 55 which are on record. If this is the position, and the factual matrix on which we are supposed to rely upon, then it is clear that the present defendant has tried to play hide & seek with regard to the state of affairs in respect of construction made by him.

8. The learned counsel for the appellant sought to put reliance on the ruling of Nagpur Bench of this Court in the case of **Gajadhar Prasad vs Bhagola Dhari Teli reported in AIR 1936 Nagpur 274** wherein it was observed that under Section 33 the owner of the dominant heritage is not entitled to institute a suit for the disturbance of the easement unless the disturbance has actually caused substantial damage to him. "Substantial damage" is defined as any act likely to injure the plaintiff by materially diminishing the value of the dominant heritage or interfering materially with the physical comfort of the plaintiff or preventing him for carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit. On the basis of observations made by the learned Single Judge as noted above, it was submitted that there was no evidence on record to show that there was substantial damage or disturbance to the plainitffs'' property in view of the construction made by the defendant. However, perusal of the judgment of both the courts below have depicted quite different state of affairs based on available evidence on record. The photographs produced on record on which basis both the courts have come to the conclusion that there was

substantial disturbance to the plaintiffs' right by construction of the defendant. Moreover, the very fact that the defendant has produced a different plan in the earlier suit on which the courts relied upon and thereafter he has changed the plan and again admittedly he has not adhered to the sanctioned plan and therefore, it cannot lie in the mouth of the defendant that for inclined construction, slope to the roof cannot be made as the corporation would not allow the same. Be as it may, the fact remains that issues involved are not the substantial questions of law and all the issues are seen to have based upon the factual aspect involved in the dispute, which are seen to be properly adjudicated in proper perspective by both the courts below.

. In this regard reference must be made to the ruling of the Apex Court in the case of **Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar and Ors** reported in **AIR 1999 SC 2213** wherein it is categorically observed that the concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under Section 100 of C.P.C. It is not within the domain of the High Court to investigate the grounds on which the findings were

arrived at, by the last court of fact, being the first appellate court. In a case where from a given set of circumstances two inferences are possible, one drawn by the lower appellate court is binding on the High Court in second appeal. Adopting any other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the first appellate court unless it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at without evidence. In the present case before us, as we have seen already, the entire record is seen to be properly appreciated by both the courts below and therefore, it would brook no interference and in the result I hold that the appeal is devoid of any merits and as such deserves to be dismissed and stands dismissed with no order as to costs.

. Consequently Civil Application No.331 of 2005 also stands dismissed with no order as to costs.